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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1687

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee for The Port Authority of New York and New Jersey Consolidated Bonds, Fortieth and Forty-First Series, on its own behalf and on behalf of all holders of Consolidated Bonds of The Port Authority of New York and New Jersey and all others similarly situated,

Appellant,

v.

THE STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor of the State of New Jersey, and WILLIAM F. HYLAND, Attorney General of the State of New Jersey,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION

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Motion To Dismiss For Want of a Substantial Federal Question

Appellees, the State of New Jersey, Governor Brendan T. Byrne and Attorney General William F. Hyland, move the Court to dismiss this appeal on the ground that the

appeal does not present a substantial federal question requiring plenary consideration, with briefs on the merits and oral argument, for its resolution.

Appellant's claim that the challenged legislation was an arbitrary exercise of the States' police power is refuted by a massive record, both stipulated and litigated, that makes clear the contrary proposition. Significantly, none of the eight judges who have reviewed it to date, in a forum of appellant's choosing, has thought otherwise. Their unanimous conclusion is reflected in the trial court's finding that "the claim that bondholder security has been materially impaired or destroyed by the repeal is simply not supported by the record." A108*

The essence of appellant's remaining claims, here as below, is that the Contract Clause provides absolute protection to every undertaking contained in or applicable to municipal bonds, regardless of how peripheral it is to securing the underlying obligation or how seriously it impedes accomplishment of vital governmental purposes. Courts have uniformly rejected that position. To adopt it would create a specially privileged class enjoying a unique immunity denied to everyone else who enters into contracts.

Statement

This is an appeal from a judgment of the Supreme Court of New Jersey, unanimously affirming a judgment of the Superior Court of New Jersey, upholding the con-

* "A" and "B" refer to the Appendix to Appellant's Jurisdictional Statement. "J.S." refers to Appellant's Jurisdictional Statement. "T." refers to the trial transcript. "Stip." refers to the Stipulation. "C" refers to a trial court exhibit. "S" refers to a State exhibit.

stitutionality of Chapter 25 of the New Jersey Laws of 1974. B5-6. The challenged 1974 statute, together with concurrent and identical legislation of the State of New York, Chapter 993 of the New York Laws of 1974, repealed legislation enacted in 1962 and hereinafter referred to as the 1962 covenant, whereby the States of New York and New Jersey and the Port Authority of New York and New Jersey were precluded from applying any of the Authority's revenues and reserves for passenger railroad purposes other than the Hudson & Manhattan Railroad (now known as PATH) unless permitted by the extraordinarily complicated criteria set forth in the 1962 legislation, N.J.S.A. 32:1-35.55. B1-4.

This action was commenced by appellant on April 30, 1974. In December 1974, the parties signed and filed a 366-page stipulation of facts with respect to the establishment and facilities of the Port Authority of New York and New Jersey; New Jersey's public transportation requirements, including analyses of demographic and transportation factors, the energy crisis and health and environmental factors; a history of rapid transit passenger rail operations in the Port District and the Metropolitan New York area from 1921 to late 1974; federal mass transportation policy as reflected in federal legislation and federal administrative determinations; the financial position of the Port Authority; a description of Port Authority bonds and bond resolutions, including the comments of the two principal bond rating agencies, Moody's and Standard & Poor's; and additional materials with respect to the enactment of the 1962 covenant and the 1974 repeal legislation. The stipulation was accompanied by 8 lengthy exhibits, including the then most recent plan of the New Jersey Department of Transportation and the latest Official Statement (or prospectus) and Annual Report of the Port Authority; a detailed analysis pre-

pared in 1961—and thus prior to the 1962 covenant—by the then General Solicitor of the Port Authority of its financial and bonding structure; a 1971 consultant's report on the Port Authority's participation in a new passenger railroad operation; and materials from 1971 and 1972 State legislative hearings with respect to the Port Authority's participation in rail mass transit.

The stipulation and its accompanying exhibits demonstrated that although the 1962 covenant did little or nothing to enhance bondholder security, it had a profoundly deleterious effect on the coordination of transportation in the Port District. It impeded rational solution of the pressing problems of increasing highway congestion, deteriorating mass transit, poisonous air pollution and uncertain petroleum supplies. Appellees were, accordingly, prepared to rest their defense of the repeal legislation on the stipulated materials.

Appellant, however, requested and was granted an opportunity to present testimony on two additional factual questions tendered by its complaint: whether Port Authority bondholders relied in any meaningful sense upon the 1962 covenant and whether the repeal of the 1962 covenant had an adverse effect on the secondary market for Port Authority bonds. The trial court also indicated that it would be desirable to present the testimony of an expert witness with respect to the financial structure of the Port Authority and the interrelationships of the 1962 covenant and the other requirements set forth in the Port Authority statutes and bond resolutions. T. 8-10, 458-59; C-2. Five days of testimony and dozens of additional exhibits were introduced with respect to these matters at the trial conducted in February 1975.

A. The lower courts found that repeal had no adverse effect upon bondholders.

On May 14, 1975, the trial court issued its comprehensive opinion sustaining the validity of New Jersey's repeal of the 1962 covenant.[1] With respect to the disputed issue of bondholder reliance upon the 1962 covenant, the trial court found that "few, if any, members of the investment community ever analyzed closely the actual effect of the 1962 covenant upon bondholder security," A90, that "the covenant cannot be said to have been the 'primary consideration' for the purchases having been made," A91, and that neither the interest rates on Port Authority bonds nor the ratings assigned to these bonds by the principal rating services were affected by the presence or absence of the 1962 covenant, A89-92. With respect to the disputed question whether the repeal of the 1962 covenant had an adverse effect upon the secondary market in Port Authority bonds, the trial court, on the basis of extensive trial testimony and exhibits comparing prices of Port Authority bonds and bonds issued by other tax-exempt agencies, found that: "The bottom line of the plaintiff's proofs on this issue is simply that the evidence fails to demonstrate that the secondary market price of Authority bonds was adversely affected by the repeal of the covenant, except for a short-term fall-off in price the effect of which has now been dissipated insofar as it can be related to the enactment of the repeal." A93-94.

The trial court carefully analyzed the numerous and powerful statutory and contractual provisions other than

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[1] The Supreme Court of New Jersey affirmed, with one Justice partially dissenting, "substantially for the reasons set forth in the opinion of" the trial court. A4. Justice Pashman's partially dissenting opinion complimented the trial court's "very enlightened and comprehensive opinion." A9.

the 1962 covenant that fully protect the security of Port Authority bondholders. A51-61. They include among other protections: the General Reserve Fund, irrevocably pledged as security for the payment of interest and principal on all Port Authority bonds, which contained $173,487,000 in 1974; the 1.3 test, which insists that net revenues exceed prospective debt service by a healthy margin before new Consolidated Bonds may be issued; the Consolidated Bond Reserve Fund, pledged as additional security for Consolidated Bonds, which grew from $7.1 million in 1972 to $21.9 million in 1973 to $46.8 million in 1974; a pledge of the net revenues from each facility financed by the issuance of Consolidated Bonds to the payment of debt service on all Consolidated Bonds; a contractual commitment to establish and collect "rents, tolls and other charges in connection with facilities the net revenues of which are pledged as security for Consolidated Bonds, to the end that at least sufficient net revenues may be produced therefrom at all times to provide for the debt service upon all Consolidated Bonds"; a prohibition on the application of any part of the Consolidated Bond Reserve Fund for the payment of operating deficits of a facility acquired without the issuance of Consolidated Bonds; and yet another prohibition on the issuance of Consolidated Bonds for a facility not previously financed by Port Authority bonds unless the Commissioners of the Port Authority certify that the issuance of the Consolidated Bonds for the proposed additional facility will not "materially impair the sound credit standing of the Authority or the investment status of Consolidated Bonds or the ability of the Authority to fulfill its commitments, whether statutory or contractual or reasonably incidental thereto, including its undertakings to the holders of Consolidated Bonds."

Thus, before the 1962 covenant was enacted and after its repeal, the Port Authority could not give its revenues to other agencies to subsidize mass transit, and it could not itself undertake any mass transit projects that might endanger the bondholders' security. It could no more take over the New York City subway system, whose irrelevant deficits appellant regularly recounts, J.S. 8, 13, than it could the national debt. A109. The trial court concluded, accordingly, that the repeal of the 1962 covenant did not, as a factual matter, materially affect the obligation of appellant's contract:

> The repeal, of course, leaves intact the provisions of the CBR [the Consolidated Bond Resolution adopted by the Authority on October 9, 1952] and the series resolutions which now constitute, together with the General Reserve Fund Act, the same measure of the bondholders' contractual security rights as existed prior to the enactment of the covenant in 1962. Presumably rational investors—including the plaintiff—purchased hundreds of millions of dollars of consolidated bonds prior to 1962, without the additional security afforded by the covenant and with full knowledge of the power of the States to direct the Authority into mass transit operations. The two principal bond rating services, upon whose judgment the financial community places great reliance, rated the consolidated bonds—minus the covenant—as securities as to which no default was anticipated.

The claim that bondholder security has been materially impaired or destroyed by the repeal is simply not supported by the record. The pledge of the Authority's net revenues and reserves remains

intact; the Authority will still be barred from the issuance of any new consolidated bonds unless the 1.3 test required by the CBR is met; and the Authority will continue to be prohibited from the issuance of any consolidated bonds or other bonds secured by a pledge of the general reserve fund without the certification required by section 7 of the series resolutions, to wit: that in the opinion of the Authority the estimated expenditures in connection with any additional facility for which such bonds are to be issued would not, for the ensuing ten years, impair the sound credit standing of the Authority, the investment status of its consolidated bonds, or the Authority's obligations to its consolidated bondholders. A108.

The soundness of the trial court's conclusion that repeal of the 1962 covenant had no material significance was promptly confirmed by leading investment advisers. Within two weeks after the trial court's opinion, Barr Brothers & Co., one of the three largest dealers in Port Authority bonds, issued a report specifically referring to the trial court's decision, summarizing the other bondholder protections and the great financial strength of the Port Authority, and concluding:

> Whether or not the Port Authority ever gets involved in Mass Transit, we feel it continues to be one of the finest revenue credits in the country, amply protected by the basic bond resolution, excellent management and some highly profitable and monopolistic facilities that can more than carry a reasonable amount of Mass Transit, particularly with the recent toll increases on the Hudson crossings providing additional revenues.

This report is from a firm that is a member of the class represented by appellant and from which it selected one of its expert witnesses. See J.S. 14, fn.

In June 1975, the month after the trial court's opinion, the two principal bond rating agencies, Standard & Poor's and Moody's, each confirmed the continuation of the Port Authority's "A" rating.[2] Standard & Poor's, while expressing a concern about the effect of future Port Authority involvement in mass transit, says: "Despite this concern, we are continuing our 'A' rating on the Port Authority's Consolidated Bonds and are also rating the new Consolidated Notes 'A' based upon the Authority's strong operating, financial and management record and the prospect for a continuation of this outstanding record." Moody's, also referring to the trial court's opinion, continues its "A" rating on Port Authority obligations because "earnings of the present facilities are good, reserves for debt service continue strong, and recent toll increases have further strengthened its financial position at this time."

These conclusions are not surprising. It was not bondholders who sought the 1962 covenant, but the management of the Port Authority. A89-90; Stip., p. 158; S-40. Until 1962, that management had resolutely, and successfully, opposed meaningful Port Authority participation in the carriage of persons by rail. See, *e.g.*, A61-65. A commitment to rail transit would have deflected them from other missions to which they attached higher priorities. See, *e.g.*, S-33. Forced at last to accept some responsibility for rail transit, they conceived of the covenant and

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[2] The "A" rating signifies that the bonds are of investment quality and that no default in payment of interest or principal is anticipated. A91.

insisted upon its enactment, as the price of their acquiescence.[3]

B. The lower courts found that repeal of the covenant was a proper exercise of the States' police power.

Though repeal of the 1962 covenant took little or nothing from appellant, it did make possible rational planning and administration of bi-State transportation efforts. The trial court found that by early 1974, when the repeal legislation was introduced, the public need for mass transportation facilities "became unprecedented as the result of the promulgation of stringent federal air pollution regulations designed to reduce automobile usage and the emergence of an energy crisis which threatened the entire system of private automobile transportation in the two States." A107. This finding is amply supported by the record.

In November 1973, the Administrator of the federal Environmental Protection Agency promulgated regulations designed to achieve a 67 percent reduction in hydro-

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[3] The State has argued from the outset that the 1962 covenant is not a constitutionally protected contract both because the Compact Clause, Art. 1, §10, cl. 3, and the Port Authority Compact itself make it voidable, and because subsequent federal developments have preempted it. The court below did not rule on these questions prefering to assume *arguendo* that a contract was made and to hold the repeal valid.

Should this Court note probable jurisdiction in the United States Trust Company case, however, it ought to note probable jurisdiction in *Gaby* v. *Port Authority of New York & New Jersey et al.*, No. 75-1712 as well, so that these issues, which have not been passed upon by the courts below, A110, may be considered fully.

carbon emissions and a 47 percent reduction in carbon monoxide emissions in the northern part of New Jersey. 38 Fed. Reg. 31388 *et seq.* (November 13, 1973). In issuing these regulations, the Administrator specifically emphasized the importance of the development of mass transit facilities to the improvement of New Jersey's air quality: "The development of large-scale mass transit facilities and the expansion and modification of existing mass transit facilities is essential to any effort to reduce automotive pollution through reductions in vehicle use." A86.

Moreover, the repeal legislation was introduced on February 15, 1974, Stip., p. 348 fn., at the very height of the energy crisis. Eleven days earlier, the New Jersey Legislature had enacted the Emergency Energy Fair Practices Act of 1974, which found that "an energy shortage now exists and may continue for the foreseeable future"; ten days earlier, Governor Byrne, in his first Executive Order, had proclaimed that an energy emergency existed. Stip., p. 43; A87.

In February 1974, the President of the United States submitted a Message to Congress on the Energy Crisis, which said that, "It is now widely recognized that the development of better mass transit systems may be one of the key solutions to both our energy and environmental problems." A87-88. Congress has repeatedly expressed agreement with this viewpoint. For example, the Regional Rail Reorganization Act of 1973, enacted on January 2, 1974, contains specific findings by Congress that "rail service and rail transportation offer economic and environmental advantages with respect to . . . energy efficiency and conservation . . . to such extent that the preservation and maintenance of adequate and efficient rail service is in the national interest." A88. See also the Energy

Supply and Environmental Coordination Act of 1974, 50 U.S.C. sections 791 *et seq.;* and the National Mass Transporation Assistance Act of 1974, A80, fn. 29. During the debate on the latter Act in late 1974, Congressman Joseph Minish of New Jersey, one of its principal sponsors, reminded Congress:

> With our present energy situation and the threat of a renewed crisis in this area, the need for mass transit aid has become ever more critical. Buses and rail cars consume only a fraction of the energy that a private automobile does, yet we cannot expect the commuting public to reduce significantly its use of private cars if we do not provide suitable alternative sources of transportation. Stip., p. 278.

In May 1975, as a direct result of the repeal of the 1962 covenant, the Port Authority increased its vehicular bridge and tunnel tolls, which had remained constant since 1927, in order "to increase its ability to finance vital mass transit improvements." C-18. The toll increase revenues, estimated at $40 million per year, will be used to finance mass transit projects that remained dormant while the covenant stood. See A80-84.

It deserves emphasis that the $40 million annual increase in revenues resulting from the toll increase would not have been available unless substantially committed to mass transit. The bridge toll increases are subject to federal approval and that approval would probably be withheld but for the intended application of the funds to mass transit. See *Delaware River Port Authority* v. *Tiemann,* 403 F. Supp. 1117 (D.N.J. 1975); Stip., pp. 280-85. In any event, the Governors would not have approved the increase if its sole purpose were to add redundant funds to already ample bond reserves in excess of $250 million.

Appellant's assertion that bondholders have lost $240 million of "their" protection J.S. 24 fn., 18, is plainly contrary to fact. All of that money, and much more, will come from funds generated by the toll increase, not otherwise available to bondholders.

The Three Questions Presented Are Not Substantial Federal Questions.

Appellant asserts first that,

> The judgment of the New Jersey Supreme Court presents the substantial question whether a State can unilaterally and retroactively revoke a solemn covenant it has made with holders of municipal bonds, or whether such bondholders are protected by the Contract and Due Process clauses of the United States Constitution. J.S. 13.

Neither of the courts below has suggested that bondholders are not "protected by the Contract and Due Process clauses of the United States Constitution." On the contrary, the Supreme Court of New Jersey has repeatedly and emphatically declared its solicitude for the rights of bondholders. For example, in *N.J. Sports & Exposition Auth.* v. *McCrane,* 61 N.J. 1, 26, 292 A.2d 545, 558, *appeal dismissed,* 409 U.S. 943 (1972), the Court said that when purchasers buy bonds "a solemn pact comes into being between them and the State" that is "secure against impairment by succeeding legislatures except for a proper exercise of the State's never abdicated police powers." And, in *N.J. Highway Auth.* v. *Sills,* 111 N.J. Super. 313, 268 A.2d 308 (Ch. Div. 1970), *aff'd,* 58 N.J. 432, 278 A.2d 489 (1971), the Court invalidated State legislation having a trivial effect upon bondholders because the legislation

was "not addressed to any problem of state-wide importance as was the Texas legislation considered in *City of El Paso.*" 111 N.J. Super. at 329, 268 A.2d at 312.

This steadfast record of concern for bondholders may well explain why appellant, a New York based bank, and its New York counsel chose to litigate first in New Jersey, though it had its choice of federal and state courts in New York as well.

All the courts below did was: (1) find that appellant had failed to establish the facts necessary to support its claim of an infringement upon its constitutional rights; and (2) decide as a matter of law that appellant was wrong in urging that any change in a contract with bondholders violates the Constitution.

The trial court's assessment of appellant's legal theories is as applicable to its jurisdictional statement as to appellant's presentation below:

> The thrust of plaintiff's argument is that any impairment of the security provisions of a contract violates the Contract Clause. It seeks to recreate a theory of the Contract Clause which, if ever imbedded in our constitutional law, no longer exists. As reflected in the course of more than 150 years of its judicial interpretation, the Contract Clause must be construed in harmony with the power of the States to alter or modify their contractual obligations where an important public interest requires. A109.

The trial court's legal analysis is unquestionably right. The history of the Contract Clause is an oft-told tale.[4]

[4] See, *e.g.*, Wright, *The Contract Clause and the Constitution* (1938); Hale, *The Supreme Court and the Contract Clause,* 57 Harv. L. Rev. 512, 621, 852 (1944).

The Clause was construed expansively in the early nineteenth century at a time when it was the sole source of federal authority to restrain unreasonable State legislation.[5] Despite the Framers' probable concern with State laws releasing private debts, see Federalist Papers No. 44, the Clause was held applicable to government contracts. The leading cases are *Fletcher* v. *Peck,* 10 U.S. (6 Cranch) 87 (1810), and *Trustees of Dartmouth College* v. *Woodward,* 17 U.S. (4 Wheat.) 518 (1819). Even these earliest cases, however, expressed concern for unduly hampering State governments in the organization of their internal affairs. In *Dartmouth College,* Chief Justice Marshall observed: "that the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted." 17 U.S. (4 Wheat.) at 629.

The earliest Contract Clause standards were refashioned, and in the process liberalized, under the weight of government's increasing responsibilities. In a series of cases this Court held that all contracts are made subject to implied conditions, among them the fair exercise of the State's police power in the interests of public health, safety and welfare. No legislature can bargain that power away. The trial court accurately summarized these cases as follows:

> First in dictum, *Boyd* v. *Alabama,* 94 U.S. 645, 650, 24 L.Ed. 302 (1877), and then by direct application of the doctrine, the court held that a lottery franchise granted for a definite term of years could be

[5] *Barron* v. *Baltimore,* 32 U.S. (7 Pet.) 243 (1833), held the Bill of Rights inapplicable to the States; *Calder* v. *Bull,* 3 U.S. (3 Dall.) 386 (1798), held the ex post facto clause inapplicable to civil legislation.

repealed. *Stone* v. *Mississippi,* 101 U.S. 814, 25 L.Ed. 1079 (1880); *Douglas* v. *Kentucky,* 168 U.S. 448, 18 S.Ct. 199, 42 L.Ed. 553 (1897). In *Northwestern Fertilizing Co.* v. *Hyde Park,* 97 U.S. 659, 24 L.Ed. 1036 (1878), it was held that a franchise to operate a fertilizer factory at a given location could be negated by the exercise of the police power to abate a nuisance. Similarly, the power to control the use of the public streets may not be bargained away, *Atlantic Coast Line R. Co.* v. *Goldsboro,* 232 U.S. 548, 34 S.Ct. 364, 58 L.Ed. 721 (1914); *Denver & Rio Grande R. Co.* v. *Denver,* 250 U.S. 241, 39 S.Ct. 450, 63 L.Ed. 958 (1919), nor can the state contractually bind itself not to exercise its power of eminent domain, *West River Bridge Co.* v. *Dix,* 47 U.S. (6 How.) 507, 12 L.Ed. 535 (1848); *Pennsylvania Hospital* v. *Philadelphia,* 245 U.S. 20, 38 S.Ct. 35, 62 L.Ed. 124 (1917), or to change the location of its governmental subdivisions, *Newton* v. *Mahoning County,* 100 U.S. 548, 25 L.Ed. 710 (1880). The broadest expression of this view of the police power during this period is to be found in *Chicago & Alton R.R.* v. *Tranbarger,* 238 U.S. 67, 35 S.Ct. 678, 59 L.Ed. 1204 (1915), where Justice Pitney said:

"It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution [the Contract and Due Process Clauses] has the effect of overriding the power of the state to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise • • •. And it is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of public health, morals or safety. [238 U.S. at 76-77, 35 S.Ct. at 682]." A100-101.

The path of Contract Clause doctrine from 1915 to now has led to progressive recognition that State police powers cannot be limited to discrete categories of State activity: eminent domain, government institutions, morals, health, key industries.[6] Rather the police power is a general one; what counts is whether it is fairly exercised. That assessment calls for harmonizing use of the reserved power with the constitutionally mandated policy of contract protection. That is the central meaning of *Home Building & Loan Ass'n* v. *Blaisdell,* 290 U.S. 398 (1934), in which this Court upheld emergency debtor relief laws, and its progeny, particularly *City of El Paso* v. *Simmons,* 379 U.S. 497 (1965). There this Court, by an 8-1 majority, rejected Justice Black's arguments for a formalistic approach and held squarely that "it is not every modification of a contractual promise that impairs the obligation of contract under federal law" (379 U.S. at 506-507). In a key passage, Justice White wrote:

> The decisions "put it beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula," as Chief Justice Hughes said in *Home Building & Loan Ass'n* v. *Blaisdell,* 290 U.S. 398. The *Blaisdell* opinion, which amounted to a comprehen-

[6] We note that this case falls clearly within two of the classic pigeonholes, promotion of health and regulation of government institutions.

sive restatement of the principles underlying the application of the Contract Clause, makes it quite clear that "[n]ot only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'had the result of modifying or abrogating contracts already in effect.' *Stephenson* v. *Binford,* 287 U.S. 251, 276. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. . . . This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court." 290 U.S. at 434. Moreover, the "economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts." *Id.* 290 U.S. at 437. The State has the "sovereign right . . . to protect the . . . general welfare of the people. . . . Once we are in this domain of the reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.'" *East New York Savings Bank* v. *Hahn,* 326 U.S. 230, 232-233. As Mr. Justice Johnson said in *Ogden* v. *Saunders,* "[i]t is the motive, the policy, the object, that must characterize the legislative act, to affect it with the imputation of violating the obligation of contracts." 12 Wheat. 213, 6 L.Ed. 606, 633.

> Of course, the power of a state to modify or affect the obligation of contract is not without limit. "[W]hatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannct be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspect. They must be construed in harmony with each other. This principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them." *Blaisdell, supra,* 290 U.S. at 439.[7]

As the last sentence quoted makes clear, the State may not have a policy of repudiating debts, destroying contracts or denying the means to enforce them. In specific instances, however, it may modify contracts where the end is legitimate and the measures taken are reasonable. And in determining whether the measures are reasonable, the legislature has "wide discretion."[8]

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[7] Appellant errs by trying to make the specific facts that supported a finding of reasonableness in *El Paso* into a doctrinal litmus. J.S. 22-24. It compounds the error in several ways: among them, it ignores that fact that Simmons lost his land while appellant has lost nothing.

[8] This would suffice to dispose of appellant's claim that the legislatures should have adopted the "obvious alternatives" to repeal, see J.S. 23 fn., even if those alternatives were available. In fact, they were not and appellant's suggestion is quite misleading. For example, appellant says that the States should "refund outstanding bonds protected by the Covenant and secure bondholder consent un-

(Footnote continued on following page)

These principles have provided State and federal courts with workable guidelines. See, *e.g., Calif. Teachers Ass'n* v. *Newport Unified School District,* 333 F. Supp. 436 (C.D. Cal. 1971); *Ohlson* v. *Phillips,* 304 F. Supp. 1152, 1156 (D.C. Colo. 1969), *aff'd,* 397 U.S. 317 (1970); *Lyon* v. *Flournoy,* 271 Cal. App.2d 774, 76 Cal. Rptr. 869 (1969), *appeal dismissed for want of a substantial federal question,* 396 U.S. 274 (1970); *Michigan Transp. Co.* v. *Secretary of State,* 41 Mich. App. 654, 201 N.W.2d 83 (1972), *leave to appeal denied,* 389 Mich. 767 (1973); *Albigese* v. *City of Jersey City,* 127 N.J. Super. 101, 112-13, 316 A.2d 483, 488-89 (Law Div.), *modified on other grounds,* 129 N. J. Super. 567, 324 A.2d 577 (App. Div. 1974); *Matter of Farrell* v. *Drew,* 19 N.Y.2d 486, 281 N.Y.S.2d 1, 227 N.E.2d 824 (1967).

These guidelines are as applicable to municipal bonds as to any other form of contract and the courts of many states have so held. Leading cases include: *Opinion of the Justices,* 313 N.E.2d 882 (Mass. 1974); *Massachusetts Port Authority* v. *Treasurer & Receiver General,* 352 Mass. 755, 227 N.E. 2d 902 (1967); *N.J. Sports & Exposition Auth.* v. *McCrane, supra,* 61 N.J. 1, 292 A.2d 545, *appeal dismissed,* 409 U.S. 943 (1972). And see, *e.g., Arizona State Highway Comm'n* v. *Nelson,* 105 Ariz. 76, 549 P.2d 509 (1969); *Beaumont* v. *Faubus,* 239 Ark. 801, 394 S.W.2d 478 (1965). Even before *El Paso,* courts held bonds, like other contracts, subject to the police power.

(Footnote continued from preceding page)

der those issues not yet refundable." Appellant proffers this suggestion although its counsel has sworn that the owners of more than $1.5 billion of the $1.6 billion in outstanding Port Authority bonds are unknown to the Port Authority or its paying agents, and although it knows that all of those bonds were issued during a period when interest rates were far lower than those currently prevailing.

E.g., New Bedford v. *New Bedford, Woods Hole, Martha's Vineyard & Nantucket S.S. Auth.,* 336 Mass. 651, 148 N.E. 2d 637, *appeal dismissed for want of a substantial federal question,* 358 U.S. 53 (1958); *Opinion of the Justices,* 334 Mass. 721, 136 N.E.2d 223 (1956); *Jacksonville Port Auth.* v. *State,* 161 So.2d 825 (Fla. 1964).

The central issue in this case is not the legal rules but rather their application to this massive record, and it is with that application that this statement is mainly concerned. One key point warrants repeated emphasis. Nothing has happened to appellant. It does not allege that the probability of repayment of the bonds has been materially affected; nor was it, at trial, able to show any dimunition of the bonds' value in the secondary market. Indeed, an investment company from whom appellant secured an expert witness affirmed that truth immediately following the trial court's opinion.

The now repealed law provided bondholders with no security at all. It did not create a lien against specific funds; it imposed no restrictions on deficit spending generally. It stated only that the purposes be other than passenger rail transit. For example, large deficits for buses were permitted. Yet what could be more absurd, and destructive of sound governmental policy, than that the choice of transit mode in the Port District be determined by the availability of Port Authority financing for one mode rather than the other—no matter what the relative balance of energy, public health and ecology considerations. The absurdity is heightened when, as here, toll increases that are permissible only because of their intended diversion to mass transit uses have substantially increased the Port Authority's revenues, making the whole program one with no net effect on bondholders.

It would be an abdication of the Government's responsibility to allow bondholders so tangentially involved to determine regional transportation policy. After all, "the Constitution is 'intended to preserve practical and substantial rights, not to maintain theories.'" *Faitoute Iron & Steel Co.* v. *City of Asbury Park*, 316 U.S. 502, 514 (1942).

Eight judges have already weighed this record in response to appellant's claims that their interests are vitally affected. None has been persuaded.

Appellant goes on to argue that:

> It is of great importance to Port Authority bondholders that this Court decide that the repealer is unconstitutional, thus returning the security provided by the Covenant and restoring the market for the bonds. J.S. 15.

But, as was made clear above, this Court's decision is of little or no importance to bondholders. Neither the "security provided by the Covenant" nor the "market for the bonds" was impaired by repeal. Appellant's selective presentation of the facts cannot mask the reality—the courts below found against it on these facts after extensive consideration. And the record fully supports those findings.

The trial court's conclusion that "few, if any, members of the investment community ever analyzed closely the actual effect of the 1962 covenant upon bondholder security," A90, is amply supported by the litigated record. Despite that finding, however, appellant continues its practice of asserting as true propositions for which there is no evidentiary support, such as that the covenant was "absolutely necessary to induce the investing public into

continuing to buy Consolidated Bonds," J.S. 13, or that the limitation was "an absolute *sine qua non*" of future Port Authority financing, J.S. 17. Appellant asserts that *it* stopped buying Port Authority bonds in 1961. J.S. 9, fn. Appellant had ample opportunity to offer evidence of its own actions but chose not to expose this assertion to cross-examination at trial. As a result, the record is wholly barren of evidence to support it.

If, contrary to the trial court's findings, investors really needed the reassurance of the covenant, investor concern should have been at its height in January 1962. At its previous session, the New York Legislature had adopted legislation containing no covenant and requiring the Authority to take over the Hudson & Manhattan. A71. Dun and Bradstreet, taking note of this, nonetheless rated the Port Authority's prospects as "Superior," P-1, and the Nineteenth series was sold on January 4, 1962 without difficulty at an interest rate of 3½ percent. A89.

Between 1962 and May 1973, the Port Authority issued 20 series of Consolidated Bonds at interest rates ranging from 3¼ percent to 6⅝ percent. A91. Though the Port Authority was now operating a passenger railroad with substantial deficits and the covenant might or might not endure,[9] bondholder enthusiasm for Port bonds continued unabated.

In 1973, New Jersey and New York enacted legislation repealing the covenant with respect to bonds issued after May 10, 1973. A83-84. In June 1973, the Port Authority

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[9] Appellant's chief witness from the investment community, John Thompson, testified that he was aware at all relevant times that under certain circumstances a State may constitutionally abrogate its contracts and that other pledges had been repudiated. T. 315-6 to 316-10, 319-11 to 13.

issued its 40th series of Consolidated Bonds at an interest rate of 6 percent. Though the covenant did not apply, appellant exercised its discretion to buy $2,570,000 of 40th series bonds for its fiduciary accounts. T. 850-13 to 853-17.

In October 1973, as the gubernatorial race between Brendan Byrne and Charles Sandman was nearing resolution, the Port Authority issued $100 million of its 41st series of Consolidated Bonds. Stip., Ex. II. Though the covenant did not apply to these bonds and candidate Byrne had, as appellant claims, called for greater participation by the Authority in mass transportation, the bonds were sold at an interest rate of 5½ percent. In light of these undisputed facts, the trial court concluded:

> it is clear that the interest rates which the Authority has had to pay on non-affected bonds [the 40th and 41st series] was not materially affected by the absence of direct covenant protection. A92.

At the trial, appellant attempted to show that the repeal of the covenant adversely affected the secondary market for Port Authority bonds. After a careful evaluation of the live testimony and comprehensive documentary evidence submitted to him, the trial court concluded:

> The bottom line of plaintiff's proofs on this issue is simply that the evidence fails to demonstrate that the secondary market price of Authority bonds was adversely affected by the repeal of the covenant, except for a short-term fall-off in price the effect of which has now been dissipated insofar as it can be related to the enactment of the repeal. A93-94.

Notwithstanding this finding, appellant persists in claiming, J.S. 17, that there was a significant decline in the

market value of its bonds. But appellant neglects to advise the Court of the fact that at the time of trial (February 1975) the prices for bonds of the Port Authority of New York and New Jersey and of the Massachusetts Port Authority (an agency selected for comparison by appellant) bore exactly the same relationship to each other that they did when appellant's exhibits began (July 1973) and immediately prior to the repeal of the covenant (April 1974). A92-93.[10]

For its final argument, appellant maintains:

> The court below erroneously justified the violation of the impairment provisions of the Constitution by terming the retroactive repeal of the 1962 Covenant an exercise of the police power. J.S. 18.

The repeal legislation questioned in this case is of vital regional importance.[11] The dependence of the New York Metropolitan area, largely embraced by the Port District, on effective mass transportation is unique in the nation. The Port of New York and New Jersey is the nation's

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[10] Appellant's claim of market disruption is similarly unfounded. J.S. 17. The trial court specifically considered the opinion testimony offered by plaintiff with respect to the alleged "thinness" of the market for Port Authority bonds. A92 and fn. 33. But appellant's evidence on this point was contradictory and internally inconsistent. See T. 93, 407, 728-29, 744-46.

[11] Appellant's suggestions, J.S. 6, 11, that the Legislatures acted precipitously in repealing the covenant is belied by the record. The 1971 legislative hearings are summarized at Stip., pp. 223-232, and some of the material presented at those hearings appears in Stip., Ex. VII. Relevant legislation was enacted in both States in 1971, in New York in 1972, in both States in 1973 and again in 1974. The New Jersey Senate held an information session on Port Authority mass transit bills in December 1972. Stip., pp. 253a-255.

greatest harbor because of its many navigable waterways; yet transporting people conveniently across and under those waterways into highly concentrated business districts is both necessary to the economic vitality of the region and difficult to accomplish. For decades, federal policies and outright subsidies have spurred private automobile ownership and use at the expense of public transportation systems that move people much more efficiently, particularly at peak hours. The consequent decline of the region's mass transportation network is now, and has long been, among its major economic problems.

Two developments of the 1970's, however, have given that problem entirely new dimensions. Automotive pollutants are now known to be principally responsible for the area's inferior air quality. The best available scientific evidence is that our citizens' health is being impaired by the presence of levels of carbon monoxide and other auto-related pollutants far in excess of federally-mandated levels established pursuant to the Clean Air Act Amendments of 1970.[12] Both states are under federal pressure to reduce pollution by imposing restrictions on driving; the restrictions, such as limits on daytime delivery of goods, are so serious that they would cause major economic dislocation. Everyone who has studied the problems agrees that more effective mass transportation must be part of the solution. Second, the Arab oil embargo, causing long lines at gas stations and restricted travel and economic activity within the States, and outright gun battles over fuel prices and allocations elsewhere, showed that

[12] In *Friends of the Earth* v. *Carey*, No. 75-7497 (2d Cir. April 26, 1976), the Court of Appeals noted that "the public of New York City is exposed to carbon monoxide pollution that has . . . climbed to over five times the federal health standards." Slip opinion at 3440.

the region's economy in the absence of mass transit alternatives could be shut down by persons and policies over whom the States have no control. Avoiding such energy dependence has become a major national policy; energy conservation is a central feature of that policy.

The great problems to which this legislation is addressed —public health, economic vitality, security in the event of emergency—are thus those central concerns of people that governments are primarily organized to address. Appellant's representation that the legislation was not enacted in pursuit of police power objectives is frivolous. Moreover, the basic goal of the two states, to permit a billion dollar bi-State transportation agency with a monopoly on regional interstate automotive crossings to utilize increased revenues derived from that traffic to support energy-conserving, less polluting alternatives, is an eminently sensible one. Appellant's principal witness has publicly urged the same policy of subsidizing mass transit at the expense of automobiles. S-4.

The narrow question on which the case turned below was whether the legislation was reasonable in view of the policy of contract protection mandated by both State and Federal Constitutions. And every judge that addressed the question concluded that the ends sought by repeal were vitally important and that bondholder interests were not materially affected.

The Suggestion That the Court Note Probable Jurisdiction and Defer Further Consideration is Without Merit.

This Court's jurisdiction turns only on whether the issues presented are substantial. A state statute was upheld by the highest court of the State in the face of a properly raised federal claim. 28 U.S.C. §1257(2).

Appellant suggests that this Court might note probable jurisdiction, and hold disposition until the conclusion of related New York litigation. That would cause further delay in the State's ability to meet the urgent problems that animated repeal more than two years ago. The vital importance of freeing the Port Authority to perform its proper role in transportation as quickly as possible has been recognized both by the political branches of State government and by the State judicial branch, which granted this case expedited treatment.

Moreover, this delay would serve no useful purpose. Appellant's New York action has no independent vitality and has in fact lain dormant since its commencement by appellant in 1974. Its resolution turns entirely on the federal issues that have been fully litigated in this case. To suggest that the New York litigation will provide an additional record or might resolve the lawsuit fully on an adequate state ground is mistaken.

New York follows the modern rule that estops a party from relitigating issues when (a) the issues are identical and decisive and (b) a full and fair opportunity to contest the decision was provided. *Schwartz* v. *Public Administrator,* 24 N.Y.2d 65, 298 N.Y.S.2d 955, 246 N.E.2d 275 (1969). The federal issues have, of course, been fully litigated in this case. All bondholders were included in the class before the New Jersey court. There will be no independent construction of federal law.

With the federal issues resolved, the New York law suit is meritless unless there is some nonfederal basis for declaring the repeal invalid under the New York State Constitution. The contention that any such basis exists is frivolous and appellant cites no case in support of its position. Unlike the New Jersey Constitution, the New York Constitution has no provision explicitly protecting contract rights. New York jurisprudence on issues of contract protection turns entirely on the meaning of the federal Constitution. See, *e.g., Gelfert* v. *National City Bank,* 313 U.S. 221 (1941); *Matter of Farrell* v. *Drew, supra,* 19 N.Y. 2d 486, 281 N.Y.S. 2d 1, 227 N.E. 2d 824 (1967).

It is a hopeless task for appellant to conjecture some basis for believing that a New York state court might find the covenant's repeal a State constitutional violation, even though it is acting on the assumption that the federal mandates have been complied with. To be sure, New York has due process clauses, New York Const., Article 1, sections 6 and 7. But, research discloses no New York cases remotely suggesting that a modification of contract rights permissible under the federal Constitution would violate these provisions of the New York Constitution. A legislative alteration of contract rights that survives analysis under the federal contract clause does not warrant independent analysis under the federal due process clause. See *Veix* v. *Sixth Ward Building & Loan Ass'n of Newark,* 310 U.S. 32, 41 (1940). New York law holds precisely the same thing. See *Twentieth Century Association, Inc.* v. *Waldman,* 294 N.Y. 571, 582, 63 N.E.2d 177, 180 (1945).

CONCLUSION

For the foregoing reasons, appellees respectfully request the Court to dismiss this appeal for want of a substantial federal question.

Respectfully submitted,

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